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May 25, 2011

**By Electronic Mail [rdd@nysb.uscourts.gov](mailto:rdd@nysb.uscourts.gov) and By Hand**

The Honorable Robert D. Drain  
United States Bankruptcy Judge  
The Charles L. Brieant, Jr. Federal Building and Courthouse  
300 Quarropas Street  
White Plains, NY 10601

Re: Richards Conditioning Corp.  
Chapter 11 Case No.: 09-22525

Richards Conditioning Corp. V. Lawrence Hopwood  
Adv. Pro. No.: 10-08408 (RDD)

Dear Judge Drain:

I serve as counsel to Richards Conditioning Corp., the above-referenced debtor and plaintiff in the adversary proceeding. I am writing to advise the Court of a development in the case which may impact the hearing before you tomorrow.

Defendant Lawrence Hopwood moved in New York State Court, by order to show cause, to vacate the lis pendens that the Debtor filed against his property on 47 Sturgis Road, Bronxville, NY (the "Home"). Defendant is selling the Home and intends to contemporaneously purchase a new home in the same general vicinity.


PENACHIO MALARA, LLP  
ATTORNEYS AT LAW

The application in State Court was substantially similar to the application scheduled to be heard before you on May 26, 2011. Judge Richard Liebowitz presided over the Defendant's application and heard oral argument on May 24, 2011. Judge Liebowitz ruled that he had concurrent jurisdiction to entertain the application on what he characterized as "an isolated issue" presented in the application.

Essentially, Judge Liebowitz, on consent of the parties, ruled that he would enter an order whereby the Debtor would file a substitute lis pendens on Defendant's new residence. A copy of the transcript is submitted herewith. I respectfully refer the Court to pages 10-13.

I believe that Judge Liebowitz's decision may resolve a substantial portion of the Defendant's motion which is returnable tomorrow.

Respectfully,

  
Anne Penachio

cc: Kevin G. Roe, Esq. (By electronic mail)

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF WESTCHESTER

3 -----x

4 RICHARDS CONDITIONING CORP.,

5 Plaintiff(s), INDEX NO.  
644-11

6 -against-

7 LAWRENCE P. HOPWOOD,

8 Defendant(s). Proceedings

9 -----x

10 May 24, 2011  
11 111 Martin Luther King Blvd.  
White, Plains, New York 10601

12 B E F O R E:

13 THE HONORABLE RICHARD B. LIEBOWITZ,  
14 JUSTICE.

15 A P P E A R A N C E S:

16 For the Plaintiff:

PENACHIO MALARA, LLP  
235 Main Street  
White Plains, NY 10601

18 BY: ANNE J. PENACHIO, ESQ.

19 For the Defendant:

KEVIN J. ROE, ESQ.  
425 Summit Avenue  
Hackensack, NJ 07601

22 Also Present:

MARTIN J. HOPWOOD, JR.

24 EVA VERSACI  
25 SENIOR COURT REPORTER

1 THE CLERK: This is Richards Conditioning Corp.  
2 versus Lawrence Hopwood, number two on the calendar, index  
3 number 404-2011. Counsel, your appearance, please.

4 MR. ROE: Kevin Roe on behalf of the moving party,  
5 the defendant Lawrence Hopwood.

6 MS. PENACHIO: Anne Penachio on behalf of the  
7 plaintiff, Richards Conditioning Corp., Penachio Malara,  
8 LLP, 235 Main Street, White Plains New York.

9 THE COURT: Who is the proponent of the  
10 application?

11 MR. ROE: If your Honor, please, I'm the proponent.

12 THE COURT: On behalf of the application, I'll hear  
13 you.

14 MR. ROE: Thank you. I bring this application,  
15 there is a pending litigation in United States Bankruptcy  
16 Court in which Richard's Conditioning has filed for  
17 protection under Chapter 11. An adversary proceeding was  
18 commenced by the bankrupt estate seeking to avoid certain  
19 transfers allegedly made or which were alleged to be  
20 avoidable under certain sections of the bankruptcy code.

21 There is currently right now an answer and  
22 counterclaim filed on issues joined before Judge Drain in  
23 the bankruptcy court. The plaintiff brought an application  
24 before Judge Drain to prohibit the transfer the consummation  
25 of the sale of the principal marital residence of Lawrence

1 Hopwood, which is owned jointly with his wife, a  
2 non-defendant and non-judgment debtor or potential judgment  
3 debtor spouse. They had owned this property as the  
4 principal marital residence for 20 some years. They had  
5 sold the property and there is a closing date for which  
6 previously had been scheduled in April but was postponed,  
7 and now a notice of time of the essence has been served  
8 seeking a closing for June 1st.

9 Ms. Penachio came before the bankruptcy court and  
10 sought an order to restrain the transfer and to defeat that  
11 sale, or at least prohibit the sale, or have the proceeds  
12 from the sale paid into an escrow account.

13 The application, when it came before Judge Drain,  
14 Lawrence Hopwood appeared and was questioned by the Court as  
15 to the intended disposition of the proceeds from that sale.  
16 In fact, there is the purchase -- the sale and purchase of a  
17 new principal marital residence Lawrence Hopwood and his  
18 wife, again, not a party to this action at all.

19 THE COURT: The proceeds from that sale will be  
20 used to fund the purchase a new piece of property?

21 MR. ROE: Yes. And that issue was specifically  
22 addressed by Judge Drain of Mr. Hopwood to the extent that  
23 90 to 95 percent of the proceeds -- I think it was a  
24 request of about \$40,000, would not be used -- would go  
25 towards the purchase of the new house, but that, in fact, it

1 was a down size -- this is a down size from a larger home to  
2 a smaller home, and it's the principal marital residence.

3 Judge Drain denied the plaintiff's application to  
4 restrain that sale, and causing thereafter no prohibition.  
5 Judge Drain questioned Mr. Lawrence Hopwood in Court and  
6 refused the plaintiff's request that there be any restraint,  
7 or that the proceeds be paid into any escrow account  
8 following or upon the closing of the title.

9 Now Ms. Penachio turns around and files the lis  
10 pendens in this Court, or with the County Clerk, which  
11 brings us here today.

12 THE COURT: The lis pendens was filed on the  
13 property that they presently own?

14 MR. ROE: Yes, which is the subject of the contract  
15 of sale, and which is scheduled to close, pursuant to time  
16 of the essence letter, on June 1st.

17 THE COURT: What legal effect would the lis pendens  
18 have?

19 MR. ROE: It would create a cloud on the title, if  
20 your Honor, please.

21 THE COURT: I understand that. But would it stop  
22 the sale?

23 MR. ROE: I believe it could, yes.

24 THE COURT: You believe or do you know it?

25 MR. ROE: I believe it, Judge.

1 THE COURT: But you're not certain? So with the  
2 lis pendens the sale could go forward? Is that what  
3 you're --

4 MR. ROE: Judge, I don't believe it could. I  
5 believe that it does constitute a cloud on the title for  
6 which the title insurance company I do not believe will  
7 insure against. And because the claim is somehow this is to  
8 defraud a creditor, in a sense, which is -- who doesn't even  
9 have a judgment against it, and for which this property has  
10 no relation to the claim whatsoever. The property in  
11 question has been owned for the past 21 years by Mr. Hopwood  
12 and his wife, and has -- was not purchased with the proceeds  
13 or any monies received in connection with his separation  
14 from the debtor corporation.

15 Again, Judge Drain was asked to prohibit that sale,  
16 or to restrain that sale, or the proceeds be paid into --  
17 and he denied it.

18 THE COURT: I understand that but now we're talking  
19 about the lis pendens.

20 MR. ROE: Correct.

21 THE COURT: That's what's before me here.

22 MR. ROE: Correct. And if, your Honor, please, I  
23 do not believe insofar as the claim of the plaintiff has --

24 THE COURT: I have a problem with the word believe.  
25 Let me -- when counsel uses that kind of a word I say to

1 myself, well are there parameters here that define what the  
2 word believe means in terms of what could happen or what  
3 might not happen? You follow?

4 MR. ROE: Judge, I could verify that with a phone  
5 call. I do not represent him on the closing of the --

6 THE COURT: Who would you call if I gave you a few  
7 moments?

8 MR. ROE: I would call the title company or the  
9 closing attorney and the title company.

10 THE COURT: Will let me stop the clock; go make  
11 your phone call.

12 MR. ROE: Thank you very much, Judge.

13 (Whereupon, there was a brief pause in the  
14 proceedings.)

15 THE COURT: What did you find out?

16 MR. ROE: Mr. Horgin, the real estate attorney, is  
17 at a funeral right now. If I could get -- I could do a  
18 couple other calls and find out.

19 THE COURT: We're out of time. Counsel has got to  
20 be before another judge as we speak. I don't want her to  
21 get in trouble, nor do I want you to get into trouble.

22 As it stands right now, how much is at stake  
23 between your client and the other side? There's a dollar  
24 amount that's in issue here.

25 MR. ROE: Their claim is 400,000, \$420,000.



1 THE COURT: And how much -- what is the amount of  
2 money transferred as a result of the sale?

3 MR. ROE: About \$900,000. Which is all getting  
4 rolled into --

5 THE COURT: I understand you need every penny of it  
6 to buy this new place.

7 MR. ROE: Right.

8 THE COURT: So in the event we tried to structure  
9 some kind of a settlement of the issue, it would not be able  
10 to be done because the amount that is going to be generated  
11 for the sale will be needed for another purchase.

12 MR. ROE: Correct.

13 THE COURT: All right.

14 MR. ROE: For a house here in Westchester County.

15 In effect it doesn't change their ability to go and  
16 execute because it's from one piece of property to another  
17 piece.

18 THE COURT: That calls into mind another option  
19 that I was thinking about.

20 IS there some kind of security interest that can be  
21 placed on the new home to protect your client?

22 MS. PENACHIO: Your Honor, I believe that perhaps  
23 an arrangement along those lines would be satisfactory. If  
24 I may, my client's sole concern at this juncture is  
25 preserving the assets and preventing them from being

1       dissipated.

2               THE COURT: He wants to know in the event he's  
3       successful he will have access to a fund of monies that  
4       would make him whole, so to speak.

5               MS. PENACHIO: That is correct, your Honor.

6               THE COURT: Could you work something out with your  
7       adversary to provide a measure of security for the other  
8       side depending the outcome of the litigation, and not stop  
9       the sale?

10              MR. ROE: If your Honor, please, they would have  
11       their rights anyway. If they -- there's no judgment here is  
12       the thing, and the claim has nothing to do with the  
13       properties. It's not a mortgage --

14              THE COURT: I understand that, counsel, but bear  
15       with me if you will. Bear with me if you will, I'm talking  
16       collectively to several capable attorneys appear before me,  
17       and I'm reaching out to you both to see if you can't  
18       construct a modality which would preserve this individual's  
19       concerns for another day at another time, and not stop the  
20       sale, or interfere with it in any way now so that your  
21       clients can proceed according to the plan that they have  
22       already embarked upon. Could that be done?

23              MR. ROE: I'll certainly take it up with my client.  
24       It doesn't necessarily do violence to any --

25              THE COURT: I see no harm that could rise from

1 this. They'll have the house, and the issue that is before  
2 the Court will still be able to be addressed on another date  
3 at another time, and for now no harm would be done to  
4 anybody. Your client would get what he needs, he would get  
5 what he needs and you move on.

6 MR. ROE: Understood.

7 THE COURT: I'm going to regard this as -- briefly  
8 give me what you consider to be your opposition, but I'm  
9 going to suggest that you both immediately take advantage of  
10 whatever time you have left to address that issue and  
11 construct something so that both sides can see some  
12 daylight. Opposition?

13 MS. PENACHIO: Thank you, your Honor. First I'd  
14 like to point out for the record that the -- that a  
15 certificate of default had been entered by the clerk of the  
16 bankruptcy court against the defendant in this case. The  
17 bankruptcy judge lifted the default, but as an express  
18 condition of lifting the default the bankruptcy judge  
19 imposed certain requirements on the defendant to protect the  
20 plaintiff from harm.

21 My argument was that if the default was lifted,  
22 that my client would suffer prejudice in that assets could  
23 be dissipated and the bankruptcy judge was very sensitive to  
24 that concern, he denied my motion for prejudgement writ of  
25 attachment, but he clearly said in the transcript on page

1 ten, which is annexed to my opposition papers, file a lis  
2 pendens. You have the ability to file a lis pendens, and he  
3 cited New York Debtor Creditor Law.

4 Following the hearing I went out and I filed a lis  
5 pendens. And the judge also imposed a requirement upon the  
6 defendant to report to me within 14 days of any  
7 extraordinary transfer of assets, and I thought that was a  
8 fair ruling under the circumstances.

9 THE COURT: Let me stop you momentarily. When is  
10 the sale supposed to take place?

11 MR. ROE: June 1st.

12 THE COURT: That gives you about a week. How long  
13 would it take you to file a lis pendens against the new  
14 premises?

15 MS. PENACHIO: A day. I don't believe it will take  
16 very long. I certainly would make it a priority, a couple  
17 of days.

18 MR. ROE: I would suggest right after the closing  
19 we'll notify there was a closing and she files a lis pendens  
20 and she's equally protected at that point.

21 THE COURT: Here's what we're going to do. I'm  
22 going to grant the order to show cause on condition. You're  
23 movant on this, you're the respondent. I'm going to deny  
24 the order to show cause but provide that you file the lis  
25 pendens against the new home contemporaneous with the sale.

1 You'll give her the information that she needs to prepare  
2 the lis pendens in advance so that there's no time lapse. I  
3 want the lis pendens to be filed on the new home  
4 simultaneously with the transfer of title so that your  
5 client is not in any jeopardy, and his client is not in any  
6 jeopardy, because he's got a time of the essence  
7 transaction.

8 MS. PENACHIO: May I just have a moment to confer  
9 with my client? I believe that that is satisfactory, but  
10 just a moment.

11 (Whereupon, there was a brief pause in the  
12 proceedings.)

13 MS. PENACHIO: My client does have a concern that  
14 there are other -- another judgment creditor --

15 THE COURT: That's why I want this to be done  
16 immediately; at the same time the deed is transferred and  
17 passing checks around you'll have your lis pendens. As a  
18 matter of fact you can provide it to the closing title  
19 person beforehand if you wish with instructions to record it  
20 immediately. You'll provide her with whatever information  
21 she needs in order to make that happen.

22 MR. ROE: What I was going to suggest, and I think  
23 your Honor is on the right track here, it would be that --  
24 I'll let her know and she can come to the closing and  
25 provide us with a discharge on one and a lis pendens on the

1 other at the closing.

2 MS. PENACHIO: That -- I believe that that would be  
3 satisfactory. I would just, as a matter of just comedy I  
4 would just like to recommend that to the bankruptcy judge  
5 and make sure he has no opposition since it affects his --  
6 but I don't have a problem with that.

7 THE COURT: Counsel, as far as I'm concerned I'm a  
8 court of concurrent jurisdiction with the bankruptcy court  
9 on this isolated issue. Do it this way so that neither one  
10 of these sides gets harmed in any way. All right?

11 MS. PENACHIO: Very well.

12 THE COURT: You go to the closing, you'll provide  
13 her with the information that she needs in order to do this  
14 simultaneous with the transaction so there's no harm done.  
15 And you'll be able to sleep, and the other side will have  
16 their home. All right?

17 MR. ROE: I'll prepare a formal order.

18 THE COURT: Prepare an order providing these  
19 conditions and I'll be happy to sign it.

20 MR. ROE: Okay.

21 MS. PENACHIO: Thank you very much, your Honor.

22 THE COURT: Very well.

23 MR. ROE: Thank you.

24 THE COURT: For the record, its denied on the  
25 record except that there are certain conditions which will

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be specified in the order that were expressed on the record.

MS. PENACHIO: Thank you.

-oOo-

CERTIFIED to be a true and accurate transcription  
of the stenographic notes.



Eva Versaci  
Senior Court